

**\*\*\* CAPITAL CASE \*\*\***

No. 17-6844

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IN THE  
SUPREME COURT OF THE UNITED STATES

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TODD WESSINGER,

Petitioner,

VERSUS

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent.

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals for the Fifth Circuit

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**REPLY BRIEF OF PETITIONER**

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## REASONS FOR GRANTING THE WRIT

### All Questions Presented By Petitioner Are Properly Before This Court And Merit Certiorari Review.

The respondent erroneously asserts that petitioner's questions presented are not ripe for consideration by this Court. Opposition to Petition for Writ of Certiorari Filed on Behalf of Darrel Vannoy, Warden (Opposition), p. 4.<sup>1</sup> According to the respondent, "the Fifth Circuit did not rule on, nor was it requested to rule on, any issue related to alleged state court refusal to fund mitigation experts" and, thus, the questions regarding the state court's denial of capital post-conviction counsel's request for funding are "not ripe for review by this Court." Opposition, p. 5. Remarkably, the respondent makes this assertion despite the circumstance that the state court refusal to grant a motion by capital post-conviction counsel for funding for a mitigation expert was the centerpiece of the panel majority's rationale in reversing the federal district court's grant of federal habeas relief.

Moreover, the traditional rule of this Court is that once a federal claim is properly presented, a party can make any argument in support of that claim and is not limited to the precise arguments they made below. *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378 (1995). As set forth more fully in the petition for a writ of certiorari, petitioner raised in federal district court a procedurally defaulted claim that his trial counsel was prejudicially ineffective in violation of the

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<sup>1</sup>Respondent proposes that the only issue that is ripe for consideration is:

Whether the Fifth Circuit properly applied this Court's precedents (primarily *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1309 (2012), and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)) under the mandates of the Antiterrorism and Effective Death Penalty Act (AEDPA) in concluding that initial review counsel was not ineffective.

Opposition, p. 4.

Sixth Amendment at the penalty phase of petitioner's first degree murder trial and sought to excuse the default, under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), due to initial review counsel's ineffectiveness in state post-conviction proceedings.

The federal district court agreed to address the issue of whether there was cause for the default based on initial review counsel's ineffectiveness under *Martinez* and, if so, to address the merits of the penalty phase ineffectiveness claim *de novo* in one federal evidentiary hearing. App. 125-126. In the course of that five-day hearing before the federal district judge, petitioner presented compelling, undisputed evidence of initial review counsel's substantial deficiencies in failing to conduct a mitigation investigation relative to trial counsel's penalty phase ineffectiveness, including the testimony of initial review counsel, who readily acknowledged his deficiencies and ineffectiveness. Petitioner also presented compelling, undisputed evidence of trial counsel's penalty phase deficiencies and his failure to conduct a mitigation investigation and the resulting prejudice.

Following the hearing, the federal district court concluded that it could consider *de novo* petitioner's procedurally defaulted claim of trial counsel's penalty phase ineffectiveness because initial review counsel, who "conducted no investigation into mitigation evidence and did not hire a mitigation specialist during his time as counsel for Petitioner's post-conviction proceedings," was prejudicially ineffective, thereby establishing "cause" for the procedural default. App. 134, 136. Reviewing the underlying claim *de novo*, the federal district court granted habeas corpus relief on petitioner's penalty phase ineffectiveness claim, finding that trial counsel's performance was deficient in that he "did not conduct a mitigation investigation," he "did not provide anything more than a large number of unprepared witnesses at the penalty phase of trial," and "none of this was done as part of any strategy." App. 139. The federal district court also found prejudice, concluding

that, “after considering the mitigation evidence presented at the evidentiary hearing before us, which was not presented to the sentencing jury,” there is “a reasonable probability that the evidence of Petitioner’s brain damage and other impairments, as well as his personal and family history would have swayed at least one juror to choose a life sentence.” App. 142.

On appeal of these rulings by respondent, a divided panel of the Fifth Circuit reversed, concluding, in spite of undisputed federal evidentiary hearing evidence of initial review counsel’s admitted deficiencies in state post-conviction proceedings, that initial review counsel’s performance in raising and developing petitioner’s claim for ineffective assistance of trial counsel at the penalty phase was not deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). App. 7. The panel majority concluded that initial review counsel’s failure to present evidentiary support of the penalty phase ineffectiveness claim to the state post-conviction court was not attributable to his inexperience or any particular error, but “because the state post-conviction court did not grant his motion for funds.” App. 8-9. The majority also concluded that petitioner failed to satisfy the prejudice inquiry because he could not show that initial review counsel’s “particular unreasonable errors, rather than decisions by the state post-conviction court,” had an adverse effect on the defense. App. 9.

As set forth more fully in petitioner’s petition for a writ of certiorari, the panel majority’s opinion is not in compliance with this Court’s ineffective assistance jurisprudence, nor does the petition raise a “mere garden-variety” disagreement with the lower court, as asserted by respondent. Opposition, p. 19. Rather, the majority opinion relieves capital defense counsel of any responsibility for conducting an investigation into mitigating evidence if the trial court does not grant a motion for funds for a mitigation investigator. This ruling presents an issue of national significance: to what extent does counsel’s well-established duty to conduct a thorough mitigation investigation obligate

counsel personally to conduct that investigation in the absence of expert mitigation investigator assistance? This issue is ripe for and fully merits certiorari review by this Court.

Further, if, as the panel majority concluded, a decision by a state post-conviction court denying funding for a mitigation investigator, rather than any error by initial review counsel, is the cause for the failure of initial review counsel to conduct a mitigation investigation and present a claim of ineffective assistance, the questions arise whether the state court's denial constitutes cause to overcome the procedural default and whether the post-conviction process is rendered ineffective, excusing the failure to exhaust under 28 U.S.C. § 2254(b)(1)(B)(ii). In light of the decision below, petitioner raises these questions for review and argues these bases in support of his consistent claim that he is entitled to habeas relief based on ineffective assistance of penalty phase trial counsel in violation of the Sixth Amendment and that his failure to exhaust the claim should be excused, and the merits of the claim decided in his favor. These questions are ripe for review in light of the panel majority opinion and fully merit review and guidance by this Court.

## CONCLUSION

For all the foregoing reasons, petitioner respectfully prays that this Court grant his writ of certiorari and permit briefing and argument on the issues presented.

RESPECTFULLY SUBMITTED,

/s/ Rebecca L. Hudsmith

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